

1 GARCIA-MENDOZA & SNAVELY  
2 EVA GARCIA-MENDOZA, ESQ.  
3 NEVADA BAR NO: 1779  
4 LUTHER SNAVELY, ESQ.  
5 NEVADA BAR NO. 5507  
6 501 SOUTH SEVENTH STREET  
7 LAS VEGAS, NEVADA 89101  
8 (702) 384-8484  
9 ATTORNEY FOR DEFENDANT

10 UNITED STATES DISTRICT COURT

11 DISTRICT OF NEVADA

12 \* \* \* \* \*

13 JANICE BATES,

14 Plaintiff,

15 vs.

16 CLARK COUNTY,

17 Defendant.

18 CV-S-04-0518-KJD(GWF)

19 MOTION FOR SUMMARY JUDGMENT

20 COMES NOW, the Defendant, Clark County, by and through its attorneys, Eva  
21 Garcia-Mendoza, Esq. and Luther Snavely, Esq. of the law firm of GARCIA-MENDOZA  
22 & SNAVELY, CHTD, and respectfully requests that Summary Judgment be entered in  
23 its favor because the pleadings and other attached documentary evidence show that  
24 there is no genuine issue as to any material fact and that the Defendant is entitled to  
25 judgment as a matter of law.

LAW OFFICES OF  
GARCIA-MENDOZA & SNAVELY CHTD.  
Eva Garcia-Mendoza, Esq.  
Luther M. Snavely, III Esq.  
501 SOUTH SEVENTH STREET  
LAS VEGAS, NEVADA 89101  
(702) 384-8484 FAX (702) 384-0207

**STATEMENT OF MATERIAL FACTS**

Pursuant to LR 56-1, the following are facts material to the disposition of this motion.

The Plaintiff, Janice Bates is an African-American female. (SEE DEPO OF BATES, p.23 AT ATTACHED EXHIBIT 1)

The Plaintiff began working for Clark County in 1996 as an Office Assistant in the Equal Opportunity Division(EOD). (SEE DEPO OF BATES, pp.20-21 AT ATTACHED EXHIBIT 1) She worked in that capacity for approximately six months before being promoted to Office Specialist in 1997. (SEE DEPO OF BATES, pp. 21-22 AT ATTACHED EXHIBIT 1)

As an Office Specialist, the Plaintiff was responsible for ordering and tracking all of the office supplies. She would fill in form letters for the analysts and she would do receptionist duties. Her duties included typing, filing, answering the telephones, talking to customers in person and on the telephone, keeping the EOD Manager's calendar and doing the travel coordination. (SEE DEPO OF BATES, p.23 AT ATTACHED EXHIBIT 1)

The Plaintiff worked as an Office Specialist in the Equal Opportunity Division from 1997 until she was promoted to Administrative Secretary in the Family Support Division on October 3, 2002. (SEE DEPO OF BATES, p.22 AT ATTACHED EXHIBIT 1, and AFFIDAVIT OF VISCONTI, paras. 9 and 40, AT EXHIBIT 2)

On July 1, 1998, George Cotton, Manager of Clark County's Equal Opportunity Division, filed a Charge of Discrimination against Clark County with the Nevada Equal

LAW OFFICES OF  
GARCIA-MENDOZA & ASSOCIATES  
Eva Garcia-Mendoza, Esq.  
Luther M. Snavely, III Esq.  
501 SOUTH SEVENTH STREET  
LAS VEGAS, NEVADA 89101  
(702) 394-8484 FAX (702) 394-0207

1 Rights Commission and the Equal Employment Opportunity Commission. (SEE  
2 EXHIBIT 3)

3 On September 2, 1998, George Cotton filed a Complaint in the U.S. District  
4 Court of Nevada against Clark County and other individual Defendants in Cotton v.  
5 Askew et. al., CV-S-98-1245-JLQ(RJJ) alleging causes of action for Race  
6 Discrimination, Age Discrimination, Retaliation, violations of civil rights and various  
7 state law claims.  
8

9 In July of 1999, Beverly Glode, Director of the Department of Human Resources,  
10 requested and received approximately five(5) reclassifications for Human Resources  
11 jobs and another approximately four or five competitive promotions for Human  
12 Resources employees with all of the attendant increases in salary which those  
13 reclassifications and promotions entailed. (SEE AFFIDAVIT OF VISCONTI, para. 12,  
14 AT EXHIBIT 2)  
15

16 By January of 2000, the Manager of the Equal Opportunity Division was still  
17 George Cotton. (SEE AFFIDAVIT OF VISCONTI, para. 7, AT EXHIBIT 2)

18 The Equal Opportunity Division was a division within the Department of Human  
19 Resources. (SEE AFFIDAVIT OF VISCONTI, para. 6, AT EXHIBIT 2)  
20

21 The Director of the Department of Human Resources at that time was Beverly  
22 Glode. (SEE AFFIDAVIT OF VISCONTI, para. 5, AT EXHIBIT 2)

23 During the same time period, Raymond Visconti was employed as Assistant  
24 Director in the Department of Human Resources. (SEE AFFIDAVIT OF VISCONTI,  
25 para. 3, AT EXHIBIT 2) The Department of Human Resources was a department which  
26 fell under the authority of Michael Alastuey, Assistant County Manager. (SEE  
27 AFFIDAVIT OF VISCONTI, para. 4, AT EXHIBIT 2)  
28

LAW OFFICES OF  
GARCIA-MENDOZA & ASSOCIATES  
Eva Garcia-Mendoza, Esq.  
Luther M. Snavely, III Esq.  
501 SOUTH SEVENTH STREET  
LAS VEGAS, NEVADA 89101  
(702) 384-8484 FAX (702) 384-0707

1 Mr. Alastuey had final authority over all job reclassifications and promotions  
2 within the Department of Human Resources. (SEE AFFIDAVIT OF VISCONTI, para. 4,  
3 AT EXHIBIT 2)

4 By early 2000, Mr. Alastuey became unhappy with Beverly Glode due to the  
5 large number of reclassifications and promotions within the Department of Human  
6 Resources. Mr. Alastuey believed that the budget for salary expense in the Human  
7 Resources Department was excessive. (SEE AFFIDAVIT OF VISCONTI, para. 13, AT  
8 EXHIBIT 2)  
9

10 On or around January 12, 2000, George Cotton attempted to obtain  
11 reclassification funding for the Equal Opportunity Division pursuant to a supplemental  
12 budget request. (SEE AFFIDAVIT OF VISCONTI, para. 14, AT EXHIBIT 2)

13 On or around January 27, 2000, George Cotton submitted a formal written  
14 Position Reclassification Request asking that the Office Specialist position held at the  
15 time by the Plaintiff be reclassified to Administrative Secretary. (SEE AFFIDAVIT OF  
16 VISCONTI, para. 15, AT EXHIBIT 2)  
17

18 On February 15, 2000, the Finance Department noted that no funding source for  
19 the reclassification was identified as is required for requests for reclassification. (SEE  
20 AFFIDAVIT OF VISCONTI, para. 16, AT EXHIBIT 2)  
21

22 On February 18, 2000, George Cotton submitted an addendum to the  
23 reclassification request wherein he purported to identify a funding source. (SEE  
24 AFFIDAVIT OF VISCONTI, para. 17, AT EXHIBIT 2)  
25  
26  
27  
28

LAW OFFICES OF  
GARCIA-MENDOZA & ASSOCIATES  
Eva Garcia-Mendoza, Esq.  
Luther M. Snavely, III Esq.  
501 SOUTH SEVENTH STREET  
LAS VEGAS, NEVADA 89101  
(702) 384-2484 FAX (702) 384-0707

1 On or around March 1, 2000, Beverly Glode approved the request for the  
2 individual reclassification proposal for the Plaintiff and sent it to Michael Alastuey for his  
3 approval. (SEE AFFIDAVIT OF VISCONTI, para. 18, AT EXHIBIT 2)

4 On April 20, 2000, the Honorable Senior U.S. District Judge Justin L.  
5 Quackenbush entered Summary Judgment in favor of all of the Defendants and  
6 dismissed George Cotton's Complaint in its entirety. Mr. Cotton appealed to the Ninth  
7 Circuit. **Cotton v. Askew et. al., CV-S-98-1245-JLQ(RJJ)**

8 In early August of 2000, Mr. Visconti had a meeting with Mr. Alastuey in which  
9 Mr. Alastuey instructed Mr. Visconti to deny any and all reclassifications for the  
10 Department of Human Resources. Mr. Alastuey told Mr. Visconti that the purpose of  
11 his decision was to slow down the overall increase in salaries within Human  
12 Resources, which he regarded as too high. In fact, no one from the Department of  
13 Human Resources received a job reclassification at this time and neither did Justice  
14 Court or the Coroner's Office. (SEE AFFIDAVIT OF VISCONTI, paras. 19 and 20, AT  
15 EXHIBIT 2)

16 George Cotton had allowed the Plaintiff, starting in 1997 or 1998, to teach new-  
17 employee orientation classes for all new Clark County and University Medical  
18 Center(UMC) employees on the topics of sexual harassment, diversity and  
19 discrimination even though it was outside her job description as an Office Specialist.  
20 (SEE AFFIDAVIT OF VISCONTI, para. 23, AT EXHIBIT 2)

21 In 2001, Mr. Visconti had discussions with the Plaintiff and others regarding his  
22 concern that Office Specialists might not be qualified to teach such classes. (SEE  
23 AFFIDAVIT OF VISCONTI, para. 24, AT EXHIBIT 2)

LAW OFFICES OF  
GARCIA-MENDOZA & ASSOCIATES  
Eva Garcia-Mendoza, Esq.  
Luther M. Snavely, III Esq.  
501 SOUTH SEVENTH STREET  
LAS VEGAS, NEVADA 89101  
17021 384-6484 FAX 17021 384-0207

1 On March 30, 2001, the Plaintiff filed her Charge of Discrimination directly with  
 2 the Equal Employment Opportunity Commission(EEOC) claiming that the Defendant  
 3 unlawfully retaliated against her in violation of Title VII. (SEE EXHIBIT 4; and DEPO  
 4 OF BATES, pp. 25-27 AT ATTACHED EXHIBIT 1)

5 On August 28, 2001, the Ninth Circuit Court of Appeals affirmed the decision of  
 6 the District Judge in its entirety. **Cotton v. Clark County**, 17 Fed. Appx. 659 (9<sup>th</sup> Cir.  
 7 2001)  
 8

9 Later in 2001, Mr. Visconti decided to leave it up to the Plaintiff whether she  
 10 wanted to continue teaching the training classes or not. Neither Mr. Visconti nor  
 11 anyone else in Clark County management, removed the training classes from the  
 12 Plaintiff at that time. Instead, Mr. Visconti spoke to the EOD staff in reference to  
 13 gradually transitioning all training from EOD to the Training Center. (SEE AFFIDAVIT  
 14 OF VISCONTI, para. 25, AT EXHIBIT 2; DEPO OF BATES, p.50 AT ATTACHED  
 15 EXHIBIT 1)  
 16

17 For most of 2001, Shawna Dudas, an employee in EOD who worked on  
 18 discrimination issues occurring at UMC, had her position paid for out of the UMC  
 19 special fund. (SEE AFFIDAVIT OF VISCONTI, para. 26, AT EXHIBIT 2)  
 20

21 During 2001-2002 and continuing to this day, Clark County has an agreement  
 22 with UMC that UMC funds certain positions wherein the Clark County employee does  
 23 work concerning Title VII issues, i.e. EOD work, occurring at UMC. The fund is known  
 24 as the "UMC special fund." (SEE AFFIDAVIT OF VISCONTI, para. 27, AT EXHIBIT 2)  
 25

26 In late 2001, Barbara King, the Manager of the Employee Relations Division,  
 27 came to Mr. Visconti and asked him to make arrangements for Shawna Dudas to be  
 28

LAW OFFICES OF  
 GARCIA-MENDOZA & ASSOCIATES  
 Eva Garcia-Mendoza, Esq.  
 Luther M. Snavely, III Esq.  
 501 SOUTH SEVENTH STREET  
 LAS VEGAS, NEVADA 89101  
 (702) 384-8484 FAX (702) 384-0207

1 transferred back to her office under Ms. King. Ms. Dudas had worked for Ms. King in  
2 the past. (SEE AFFIDAVIT OF VISCONTI, para. 30, AT EXHIBIT 2)

3 In order to comply with Ms. King's request, Mr. Visconti switched Ms. Dudas  
4 back to the general fund because, in her capacity as an employee within the Employee  
5 Relations Division, Ms. Dudas would not be doing any more EOD work for UMC.  
6 Accordingly, Mr. Visconti could no longer justify having her salary paid out of the UMC  
7 special fund. (SEE AFFIDAVIT OF VISCONTI, para. 31, AT EXHIBIT 2)

8 Prior to the switch in funding source, some of the Plaintiff's job duties involved  
9 her doing work concerning EOD issues at UMC. (SEE AFFIDAVIT OF VISCONTI,  
10 para. 32, AT EXHIBIT 2)

11 Therefore, Mr. Visconti switched the funding for the Plaintiff's position from the  
12 general fund to the UMC special fund because the Plaintiff was continuing to do EOD  
13 work for UMC. (SEE AFFIDAVIT OF VISCONTI, para. 33, AT EXHIBIT 2)

14 On April 12, 2002, the Plaintiff filed an Amended Charge of Discrimination  
15 directly with the Equal Employment Opportunity Commission(EEOC) claiming that the  
16 Defendant unlawfully retaliated against her and discriminated against her on account of  
17 her race in violation of Title VII. (#1) (SEE ALSO EXHIBIT 5)

18 The Plaintiff was promoted to Administrative Secretary in the Family Support  
19 Division on October 3, 2002. (SEE AFFIDAVIT OF VISCONTI, para. 40, AT EXHIBIT  
20 2)

21 On April 27, 2004, the Plaintiff filed the Complaint alleging violation of Title VII  
22 for Retaliation and Disparate Treatment Racial Discrimination which is now before this  
23 Court. (#1)

LAW OFFICES OF  
GARCIA-MENDOZA & ASSOCIATES  
Eva Garcia-Mendoza, Esq.  
Luther M. Shavely, III Esq.  
501 SOUTH SEVENTH STREET  
LAS VEGAS, NEVADA 89101  
(702) 384-8484 FAX (702) 384-0207

**ARGUMENT**

**PLAINTIFF'S COMPLAINT**

In her Complaint(#1) and the Amended Charge of Discrimination to the Equal Employment Opportunity Commission which the Plaintiff attaches to her Complaint, the Plaintiff alleges that:

1. the Defendant denied her a job reclassification on August 23, 2000, "in retaliation for my association with the former Director of Equal Opportunity, who filed an EEOC charge of discrimination in violation of Title VII of the Civil Rights Act of 1964...." ;
2. the Defendant denied her a job reclassification on March 14, 2001, "in retaliation for my association with the former Director of Equal Opportunity, who filed an EEOC charge of discrimination in violation of Title VII of the Civil Rights Act of 1964....";
3. her training duties were removed i.e. she was no longer allowed to teach discrimination classes; and
4. the funding for her position as an Office Specialist was switched from the Clark County general fund to the UMC special fund on account of retaliation as described above and also on account of her race. (SEE EXHIBIT 5)

The Plaintiff makes clear in her deposition that she is claiming retaliation as to both of the decisions in August of 2000 and March of 2001 when the Defendant allegedly declined to reclassify her position and also to the switch in funding. In contrast, the Plaintiff is only claiming disparate treatment race discrimination in regards

LAW OFFICES OF  
GARCIA-MENDOZA & ASSOCIATES  
Eva Garcia-Mendoza, Esq.  
Luther M. Snavely, III Esq.  
501 SOUTH SEVENTH STREET  
LAS VEGAS, NEVADA 89101  
(702) 394-8484 FAX (702) 394-0207



1 to the switch in the funding of her position. (SEE DEPO OF BATES, pp. 31-33 AT  
2 ATTACHED EXHIBIT 1)

3 Furthermore, in regards to the allegation that her training was taken away, the  
4 Plaintiff testified in her deposition that, in fact, her training classes were not taken away  
5 from her and that Mr. Visconti left it to her discretion whether to continue to teach the  
6 classes. (SEE DEPO OF BATES, p.50 AT ATTACHED EXHIBIT 1; and AFFIDAVIT OF  
7 VISCONTI, para. 25, AT EXHIBIT 2)

8  
9 Moreover, in regards to her claims for retaliation, the Plaintiff is claiming that her  
10 position was not reclassified on two occasions in retaliation against her because of her  
11 association with George Cotton, the former Manager of the Equal Opportunity Division  
12 within Clark County's Department of Human Resources, who filed a Charge of  
13 Discrimination against Clark County with the Nevada Equal Rights Commission and the  
14 Equal Employment Opportunity Commission on July 1, 1998.

15  
16 Also, in the Plaintiff's Complaint, she refers to a Determination by the Equal  
17 Employment Opportunity Commission in which EEOC concluded that there was a  
18 preponderance of evidence to establish that the Defendant retaliated against the  
19 Plaintiff because of her association with George Cotton. (SEE EXHIBIT 6) For reasons  
20 which will be discussed thoroughly below, the Determination letter has little probative  
21 value and does not create a genuine issue of fact for purposes of avoiding summary  
22 judgment.  
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LAW OFFICES OF  
GARCIA-MENDOZA & ASSOCIATES  
Eva Garcia-Mendoza, Esq.  
Luther M. Snavely, III Esq.  
501 SOUTH SEVENTH STREET  
LAS VEGAS, NEVADA 89101  
(702) 384-8484 FAX (702) 384-0707

**STANDARD OF REVIEW FOR MOTION  
FOR SUMMARY JUDGMENT**

Summary Judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. FRCP 56(c). As a prerequisite to summary judgment, a moving party must demonstrate "an absence of evidence to support the non-moving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once a moving party has properly supported its motion for summary judgment, the nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts. Matsushita Elec. Indus. Co. Zenith Radio, 475 U.S. 574, 586 (1986). The nonmoving party may not rest on mere allegations or denials of the pleading but must come forward with specific facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. Id. at 249-250. The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. However, where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. Matsushita at 587.

A mere scintilla of evidence will not do, for a jury is permitted to draw only those inferences of which the evidence is reasonably susceptible; it may not resort to speculation. British Airways Board v. Boeing Co., 585 F.2d 946, 952 (9<sup>th</sup> Cir. 1978), cert. denied, 440 U.S. 981 (1979). Moreover, if the factual context makes the nonmoving party's claim implausible, that party must come forward with more

LAW OFFICES OF  
GARCIA-MENDOZA & ASSOCIATES  
Eva Garcia-Mendoza, Esq.  
Luther M. Shavely, III Esq.  
501 SOUTH SEVENTH STREET  
LAS VEGAS, NEVADA 89101  
(702) 384-8484 FAX (702) 384-0207

1 persuasive evidence than otherwise would be necessary to show there is a genuine  
2 issue for trial. **California Architectural Bldg. Products v. Franciscan Ceramics,**  
3 **Inc., 818 F.2d 1466, 1468 (9<sup>th</sup> Cir. 1987) cert. denied, 484 U.S. 1006 (1988)**  
4

5  
6 **STANDARD OF REVIEW OF CLAIMS OF RETALIATION**  
7

8 Claims for Retaliation in violation of Title VII arise out of the provisions of 42  
9 U.S.C. §2000e-3(a).

10 42 U.S.C. §2000e-3(a) states in relevant part:

11 It shall be an unlawful employment practice for an employer to discriminate  
12 against any of his employees or applicants for employment...or...to discriminate  
13 against any individual...because he has opposed any practice made an unlawful  
14 employment practice...."

15 To establish a prima facie case of retaliation under Title VII, the Plaintiff must  
16 show that :

17 1. she was engaging in a protected activity;  
18 2. that she suffered an adverse employment decision; and  
19 3. that there was a causal link between the protected activity and the  
20 adverse employment decision. **Tarin v. County of Los Angeles, 123 F.3d 1259 (9<sup>th</sup>**  
21 **Cir. 1997)**  
22

23 Once the employee has established a prima facie case for retaliation, the  
24 burden of production shifts to the employer to articulate some legitimate  
25 nondiscriminatory reasons for the adverse employment decision. **Id. at 1264.** If the  
26 employer is successful, the Plaintiff must prove by a preponderance of the evidence  
27  
28

LAW OFFICES OF  
GARCIA-MENDOZA & ASSOCIATES  
Eva Garcia-Mendoza, Esq.  
Luther M. Shavely, III Esq.  
501 SOUTH SEVENTH STREET  
LAS VEGAS, NEVADA 89101  
(702) 384-8484 FAX (702) 384-0207

1 that the proffered reasons are pretexts for retaliation or that a discriminatory reason  
2 more likely motivated the employer's action. Id. at 1264.

3  
4 **THE PLAINTIFF'S CLAIM THAT THE DEFENDANT RETALIATED AGAINST HER**  
5 **BY DECLINING TO RECLASS HER POSITION ON AUGUST 23, 2000 IS BARRED**  
6 **BY THE STATUTE OF LIMITATIONS**

7 The Plaintiff filed her Charge of Discrimination with the EEOC more than one-  
8 hundred and eighty(180) days after she was denied a reclassification on August 23,  
9 2000 and she did not initially institute proceedings with the Nevada Equal Rights  
10 Commission. Accordingly, the Plaintiff's claim for retaliation on account of the  
11 Defendant's decision to deny her position reclassification on August 23, 2000 is barred  
12 by the statute of limitations as provided in 42 U.S.C. §2000e-5(e)(1).

13  
14 42 U.S.C. §2000e-5(e)(1) states in relevant part:

15  
16 "(1) A charge under this section shall be filed within one hundred and eighty  
17 days after the alleged unlawful employment practice occurred..., except that in a case  
18 of an unlawful employment practice with respect to which the person aggrieved has  
19 initially instituted proceedings with a State or local agency with authority to grant or  
20 seek relief from such practice or to institute criminal proceedings with respect thereto,  
upon receiving notice thereof, such charge shall be filed by or on behalf of the person  
aggrieved within three hundred days after the alleged unlawful employment practice  
occurred...."

21 Here, the Plaintiff testified in her deposition that she filed her initial Charge of  
22 Discrimination directly with the EEOC on March 30, 2001 and that she did not file  
23 anything with the Nevada Equal Rights Commission. (SEE DEPO OF BATES, pp. 26-  
24 27 AT ATTACHED EXHIBIT 1)

25 Thus, the Plaintiff had one hundred and eighty days after the alleged unlawful  
26 employment practice occurred on August 23, 2000 to file her Charge of Discrimination  
27 with the EEOC. Since the Plaintiff claims she was denied the position reclassification  
28

LAW OFFICES OF  
GARCIA-MENDOZA & ASSOCIATES  
Eva Garcia-Mendoza, Esq.  
Luther M. Snavely, III Esq.  
501 SOUTH SEVENTH STREET  
LAS VEGAS, NEVADA 89101  
(702) 384-9494 FAX (702) 384-0207

1 on August 23, 2000, she had until no later than February 23, 2001 to file her Charge of  
2 Discrimination with the EEOC.

3 However, a review of EXHIBIT 4 reveals that the Plaintiff did not actually file her  
4 Charge of Discrimination with the EEOC until March 30, 2001, a full month after the  
5 deadline for filing the Charge of Discrimination with the EEOC had passed.

6 Accordingly, the Court should enter Summary Judgment against the Plaintiff as  
7 to her retaliation claim based upon her allegation that the Defendant denied her a  
8 position reclassification on August 23, 2000.

10  
11 **THE PLAINTIFF DID NOT DENY A REQUEST FOR RECLASSIFICATION**  
12 **ON MARCH 14, 2001**

13  
14 The Defendant has searched its files and cannot find any record indicating that a  
15 Position Reclassification Request was filed, in regards to any position held by the  
16 Plaintiff, between February 18, 2000 and March 14, 2001. (SEE AFFIDAVIT OF  
17 VISCONTI, para. 22, AT EXHIBIT 2)

18 Furthermore, the Defendant cannot find any record of a Position Reclassification  
19 Request filed in regards to any position held by the Plaintiff being denied on or around  
20 March 14, 2001. (SEE AFFIDAVIT OF VISCONTI, para. 22, AT EXHIBIT 2)

21 Accordingly, it is the Defendant's belief that it did not deny any reclassification  
22 request in regards to a job being held by the Plaintiff on March 14, 2001 and that the  
23 Court should enter Summary Judgment in favor of the Defendant in regards to this  
24 allegation.

25  
26 The nonmoving party may not rest on mere allegations or denials of the pleading  
27 but must come forward with specific facts showing that there is a genuine issue for trial  
28

LAW OFFICES OF  
GARCIA-MENDOZA & ASSOCIATES  
Eva Garcia-Mendoza, Esq.  
Luther M. Shavely, III Esq.  
501 SOUTH SEVENTH STREET  
LAS VEGAS, NEVADA 89101  
(702) 384-8484 FAX (702) 384-0207

1 in order to avoid the entry of summary judgment. Anderson v. Liberty Lobby, Inc.,  
 2 **477 U.S. 242, 256 (1986)**

3 If the Plaintiff has something other than her own self-serving statements to prove  
 4 that the Defendant actually denied a Position Reclassification Request, filed on the  
 5 Plaintiff's behalf, on March 14, 2001, then the Plaintiff must be required to provide such  
 6 proof in her Opposition to this motion.  
 7

8  
 9 **THE PLAINTIFF'S CLAIM THAT THE DEFENDANT RETALIATED AGAINST**  
 10 **HER BY TAKING HER TRAINING CLASSES AWAY SHOULD BE**  
 11 **DISMISSED BECAUSE THE PLAINTIFF HAS ADMITTED THAT THE**  
 12 **TRAINING CLASSES WERE NOT TAKEN AWAY**

13 In regards to the allegation that her training classes were taken away, the  
 14 Plaintiff testified in her deposition that, in fact, her training classes were not taken away  
 15 from her and that Mr. Visconti left it to her discretion whether to continue to teach the  
 16 classes (SEE DEPO OF BATES, p.50 AT ATTACHED EXHIBIT 1; and AFFIDAVIT OF  
 17 VISCONTI, para. 25, AT EXHIBIT 2)

18 Accordingly, the Defendant did not retaliate or discriminate against the Plaintiff  
 19 by taking her training classes away from her and Summary Judgment should be  
 20 entered in favor of the Defendant.  
 21

22 **THE PLAINTIFF CANNOT ESTABLISH A PRIMA FACIE CASE**  
 23 **FOR RETALIATION**

24  
 25 The Plaintiff cannot establish a prima facie case for retaliation because (1) she  
 26 was not engaged in a protected activity, (2) the denial of the job reclassification in  
 27 2000, the alleged denial of a job reclassification in 2001 and the funding switch were not  
 28 adverse employment actions and (3) there is no causal link between George Cotton's

LAW OFFICES OF  
 GARCIA-MENDOZA & ASSOCIATES  
 Eva Garcia-Mendoza, Esq.  
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 501 SOUTH SEVENTH STREET  
 LAS VEGAS, NEVADA 89101  
 (702) 384-8484 FAX (702) 384-0207

1 Charge of Discrimination and the denial of the job reclassification in 2000, the alleged  
2 denial of the job reclassification in 2001 or the funding switch in late 2001.

3  
4 **The Plaintiff Is Not Claiming That She Was Retaliated Against Because**  
5 **She Engaged In A Protected Activity**

6 The Plaintiff's cause of action for retaliation should be dismissed because she is  
7 not claiming that she was retaliated against because she engaged in a protected  
8 activity. The Defendant respectfully requests that this Court follow the Circuit Courts of  
9 Appeal which have held that third-party retaliation claims are contrary to the plain  
10 language of 42 U.S.C. §2000e-3(a) and do not state a claim upon which relief can be  
11 granted.

12  
13 As noted above, the Plaintiff avers in her Complaint that her position was not  
14 reclassified and the funding for her position was switched, "in retaliation for my[the  
15 Plaintiff's] association with the former Director of Equal Opportunity, who filed an EEOC  
16 charge of discrimination in violation of Title VII of the Civil Rights Act of 1964...."

17  
18 The Defendant is not aware of any case law which holds that merely associating  
19 with another employee constitutes a protected activity. Here, the only possible  
20 protected activity asserted by the Plaintiff is the act of George Cotton filing a Charge of  
21 Discrimination in July of 1998.

22 Therefore, the Plaintiff is actually attempting to assert a third-party retaliation  
23 claim. She is not claiming to have engaged in protected activity herself but, instead, is  
24 claiming that she was retaliated against because George Cotton engaged in a  
25 protected activity.

26  
27 The Ninth Circuit Court of Appeals has not taken up the issue of whether a third-  
28 party retaliation claim states a claim upon which relief can be granted.

LAW OFFICES OF  
GARCIA-MENDOZA & ASSOCIATES  
Eva Garcia-Mendoza, Esq.  
Luther M. Snavely, III Esq.  
501 SOUTH SEVENTH STREET  
LAS VEGAS, NEVADA 89101  
(702) 384-8484 FAX (702) 384-0207

1 However, the Third, Fifth and Eighth Circuit Courts of Appeal have all held that  
 2 third-party retaliation claims, such as the one which the Plaintiff brings before the Court  
 3 in this case, do not state a claim upon which relief can be granted because they  
 4 contravene the plain language of 42 U.S.C. §2000e-3(a) which clearly provides that a  
 5 person may only bring a claim for retaliation if he is claiming that he is being retaliated  
 6 against for protected activity which, he himself, engaged in. See Fogelman v. Mercy  
 7 Hosp., 283 F.3d 561, 568-571 (3<sup>rd</sup> Cir. 2002); Holt v. JTM Indus., Inc., 89 F. 3d 1224,  
 8 1226-1227 (5<sup>th</sup> Cir. 1996) and Smith v. Riceland Foods, 151 F.3d 813, 819 (8<sup>th</sup> Cir.  
 9 1998)

10 Furthermore, in Pope v. Motel 6, 121 Nev. Adv. Rep. 31, 114 P.3d 277, 281-  
 11 282 (2005), the Nevada Supreme Court acknowledged that 42 U.S.C. §2000e-3(a) was  
 12 virtually identical to NRS 613.340(1), Nevada's anti-retaliation statute, and then  
 13 specifically followed the reasoning in Fogelman, Holt, and Smith v. Riceland Foods  
 14 in holding that third party retaliation claims fail to state a claim upon which relief can be  
 15 granted.

16 The Plaintiff's Complaint states a third-party retaliation claim. Since third-party  
 17 retaliation claims fail to state a claim upon which relief can be granted as a matter of  
 18 law, Summary Judgment should be entered in favor of the Defendant and the Plaintiff's  
 19 Complaint should be dismissed in its entirety.

20 The Defendant firmly believes that no further analysis in this case on the issue  
 21 of retaliation is necessary. However, for the sake of prudence, the Defendant will also  
 22 show why the Plaintiff fails to establish the other elements of a prima facie case and  
 23 that the Defendant had legitimate nondiscriminatory reasons for declining to reclassify

LAW OFFICES OF  
 GARCIA-MENDOZA & ASSOCIATES  
 Eva Garcia-Mendoza, Esq.  
 Luther M. Shavely, III Esq.  
 501 SOUTH SEVENTH STREET  
 LAS VEGAS, NEVADA 89101  
 (702) 384-8484 FAX (702) 384-0207



1 the Plaintiff's job in 2000 and for switching the funding for the Plaintiff's position in late  
2 2001.

3  
4 **The Denial Of The Job Reclassification In 2000, The**  
5 **Alleged Denial of the Job Reclassification In 2001, And The**  
6 **Switch In Funding Source In Late 2001**  
7 **Were Not Adverse Employment Decisions**

8 The denial of the reclassification of the Plaintiff's job in 2000 and the alleged  
9 denial of the job reclassification in 2001 were not adverse employment decisions  
10 because the Plaintiff was not turned down for a promotion. Instead, the Defendant  
11 merely declined to reclassify the Plaintiff's job to Administrative Secretary.

12 Furthermore, the switch in the funding of the Plaintiff's position from the general  
13 fund to the UMC special fund did not constitute an adverse employment decision  
14 because the Plaintiff was not demoted, given any additional responsibilities or subject  
15 to a decrease in pay or benefits.

16 Not every employment decision amounts to an adverse employment action.

17 **Brooks v. City of San Mateo, 229 F.3d 917, 928 (9th Cir. 2000)** Among those  
18 employment decisions which might constitute an adverse employment action are  
19 termination, dissemination of a negative employment reference, issuance of an  
20 undeserved negative performance review and refusal to consider for promotion. **Id.** By  
21 contrast, the Ninth Circuit has held that declining to hold a job open for an employee  
22 and badmouthing an employee outside the job reference context do not constitute  
23 adverse employment action. **Id. at 928-929.** Furthermore, the Ninth Circuit Court held  
24 in **Brooks at 929-930** that a negative performance review did not constitute an adverse  
25 employment action when it was subject to modification by the City and the Plaintiff had  
26  
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28

LAW OFFICES OF  
GARCIA-MENDOZA & ASSOCIATES  
Eva Garcia-Mendoza, Esq.  
Luther M. Snavely, III Esq.  
501 SOUTH SEVENTH STREET  
LAS VEGAS, NEVADA 89101  
(702) 384-8484 FAX (702) 384-0207

1 declined to fully utilize the appeal process where the negative evaluation could very  
2 well have been changed on appeal.

3 Likewise, the Ninth Circuit has held that a transfer with no reduction in  
4 compensation did not constitute an adverse employment action. **Nidds v. Schindler**  
5 **Elevator Corp.**, 113 F.3d 912, 919 (9<sup>th</sup> Cir. 1997)  
6

7 Also, in **Steiner v. Showboat Operating Co.**, 25 F.3d 1459, 1465, n.6 (9<sup>th</sup> Cir.  
8 1994), the Court questioned whether there was any adverse employment action where  
9 the Plaintiff was not demoted or put in a worse job or given any additional  
10 responsibilities.

11 Similarly, the Sixth Circuit has held that no adverse employment action occurred  
12 where a temporary transfer did not result in loss of salary or benefits. **Yates v. Advo**  
13 **Corp.**, 819 F.2d 630, 638 (6<sup>th</sup> Cir. 1987)  
14

15 Here, the Plaintiff was not demoted or given additional duties and she did not  
16 suffer a loss of salary or benefits as a result of the Position Reclassification Request  
17 being denied.

18 Furthermore, the switch of the funding of the Plaintiff's position from general  
19 fund to UMC special fund did not constitute an adverse employment decision.  
20

21 A Clark County employee whose position is paid for out of the UMC special fund  
22 is still considered a full-time Clark County employee with all of the rights and privileges  
23 of any other Clark County employee as set forth in the Collective Bargaining  
24 Agreement and the Merit Personnel System. (SEE AFFIDAVIT OF VISCONTI, para.  
25 28, AT EXHIBIT 2)  
26

27 In fact, from the Plaintiff's perspective, there is no difference between working in  
28 a position funded out of the UMC special fund or in a position funded out of the Clark

LAW OFFICES OF  
GARCIA-MENDOZA & ASSOCIATES  
Eva Garcia-Mendoza, Esq.  
Luther M. Snavely, III Esq.  
501 SOUTH SEVENTH STREET  
LAS VEGAS, NEVADA 89101  
(702) 384-8484 FAX (702) 384-0207

1 County General fund. (SEE AFFIDAVIT OF VISCONTI, para. 29, AT EXHIBIT 2) The  
 2 only substantive difference is that the money to pay a UMC special fund position  
 3 employee originates from UMC rather than from the Clark County general fund. (SEE  
 4 AFFIDAVIT OF VISCONTI, para. 29, AT EXHIBIT 2)

5  
 6 In addition, prior to the funding switch, the Plaintiff was working in a permanent  
 7 funded position and this remained true after the funding switch. (SEE AFFIDAVIT OF  
 8 VISCONTI, para. 35, AT EXHIBIT 2) After the funding switch, the Plaintiff remained a  
 9 full-time Clark County employee with all of the rights and privileges of any other Clark  
 10 County employee as set forth in the Collective Bargaining Agreement and the Merit  
 11 Personnel System. (SEE AFFIDAVIT OF VISCONTI, para. 36, AT EXHIBIT 2)

12  
 13 Moreover, as a result of the funding switch, Ms. Bates did not suffer any  
 14 decrease in pay or benefits and her duties were not altered as a result of the funding  
 15 switch. (SEE AFFIDAVIT OF VISCONTI, para. 37, AT EXHIBIT 2)

16 Accordingly, the decision by the Defendant not to reclassify the Plaintiff's Office  
 17 Specialist position to an Administrative Secretary position was not an adverse  
 18 employment action. Furthermore, the decision to switch the funding of the Plaintiff's  
 19 position was, likewise, not an adverse employment decision.  
 20

21  
 22 **There Is No Causal Link Between George Cotton's Filing Of His**  
 23 **Charge Of Discrimination And The Defendant's Decisions To**  
 24 **Decline To Reclassify The Plaintiff's Job In 2000, To Allegedly Decline**  
 25 **To Reclassify The Plaintiff's Job In 2001 Or To Switch The Funding**  
 26 **Source Of The Plaintiff's Position In Late 2001**

27  
 28 The Plaintiff cannot show that there is any causal connection between George  
 Cotton's filing of his Charge of Discrimination in July of 1998 and the Defendant's  
 decisions to decline to reclassify the Plaintiff's job in 2000, to allegedly decline to

LAW OFFICES OF  
 GARCIA-MENDOZA & ASSOCIATES  
 Eva Garcia-Mendoza, Esq.  
 Luther M. Snavely, III Esq.  
 501 SOUTH SEVENTH STREET  
 LAS VEGAS, NEVADA 89101  
 (702) 384-8484 FAX (702) 384-0207

1 reclassify her job in 2001 or to switch the funding source of the Plaintiff's position in late  
2 2001.

3 To establish causation, the Plaintiff must show by a preponderance of the  
4 evidence that engaging in a protected activity was one of the reasons for the adverse  
5 employment action and that, but for such activity, the adverse employment action  
6 would not have occurred. **Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1064-  
7 1065 (9<sup>th</sup> Cir. 2002)** While in some cases causation may be inferred from timing alone  
8 where an adverse employment action follows on the heels of a protected activity, no  
9 causation will be inferred where there is an eighteen(18) month or longer lapse  
10 between protected activity and adverse employment action. **Id.**

11 Here, it is undisputed that George Cotton filed his Charge of Discrimination with  
12 NERC and EEOC on July 1, 1998. (SEE EXHIBIT 3). Furthermore, the Plaintiff, in her  
13 own Amended Charge of Discrimination attached to her Complaint, alleges that she  
14 was retaliated against, at the earliest, on August 22, 2000 when the Position  
15 Reclassification Request filed on or around January 27, 2000 was denied. As noted  
16 above, the Plaintiff does not allege any retaliation before August 22, 2000.

17 Since there is a lapse of over two years, i.e. 26 months, between the time that  
18 George Cotton filed his Charge of Discrimination and the time that the Plaintiff claims  
19 she was retaliated against on account of George Cotton filing his Charge of  
20 Discrimination, causation may not be inferred pursuant to the Ninth Circuit's holding in  
21 **Villiarimo**.

22 Raymond Visconti, Assistant Director in the Department of Human Resources,  
23 testifies in his affidavit that he was directly involved with and has comprehensive  
24 personal knowledge of (1) the process by which George Cotton attempted to receive  
25  
26  
27  
28

LAW OFFICES OF  
GARCIA-MENDOZA & ASSOCIATES  
Eva Garcia-Mendoza, Esq.  
Luther M. Snavely, III Esq.  
501 SOUTH SEVENTH STREET  
LAS VEGAS, NEVADA 89101  
(702) 384-8484 FAX (702) 384-0207

1 reclassification funding for the Equal Opportunity Division and (2) the process by which  
 2 George Cotton attempted to obtain a reclassification of the Plaintiff's job in 2000. (SEE  
 3 AFFIDAVIT OF VISCONTI, para. 11, AT EXHIBIT 2)

4 Moreover, Mr. Visconti testifies in his affidavit that neither the request for a job  
 5 reclassification in 2000 nor the decision to switch the funding source for the Plaintiff's  
 6 job in late 2001 happened on account of George Cotton's past or present complaints  
 7 about Clark County, or for that matter, anyone else's past or present complaints about  
 8 Clark County. (SEE AFFIDAVIT OF VISCONTI, paras. 21, 38-39 AT EXHIBIT 2)

9 Likewise, Mr. Visconti testifies in his affidavit that he did not approve the switch  
 10 in the funding source for the Plaintiff's position because of George Cotton's past or  
 11 present complaints about Clark County, or for that matter, anyone else's past or  
 12 present complaints about Clark County. Furthermore, Mr. Visconti testifies that he did  
 13 not approve the switch in the funding source for the Plaintiff's position on account of  
 14 anyone's race. (SEE AFFIDAVIT OF VISCONTI, paras. 21, 38-39 AT EXHIBIT 2)

15 As noted above, the Defendant does not believe that it denied a Position  
 16 Reclassification Request on March 14, 2001.

17 There is nothing in the record to establish causation between George Cotton  
 18 filing his Charge of Discrimination and the Defendant's actions in regard to the Plaintiff  
 19 in 2000 and 2001 by a preponderance of the evidence.

20 Accordingly, the Plaintiff's Complaint should be dismissed in its entirety.  
 21  
 22  
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LAW OFFICES OF  
 GARCIA-MENDOZA & ASSOCIATES  
 Eva Garcia-Mendoza, Esq.  
 Luther M. Snavely, III Esq.  
 501 SOUTH SEVENTH STREET  
 LAS VEGAS, NEVADA 89101  
 (702) 384-8484 FAX (702) 384-0207

**THE DEFENDANT HAD LEGITIMATE NONDISCRIMINATORY REASONS  
FOR DECLINING TO RECLASSIFY THE PLAINTIFF'S JOB IN 2000 AND FOR  
SWITCHING THE FUNDING SOURCE FOR THE PLAINTIFF'S POSITION IN 2001**

As set forth above, it should not be necessary for the Defendant to set forth its legitimate nondiscriminatory reasons for its actions in regard to the Plaintiff because the Plaintiff cannot establish a prima facie case for retaliation. Nonetheless, the Defendant sets forth its legitimate nondiscriminatory reasons below.

The fact of the matter is that the reclassification request was turned down by Michael Alastuey in 2000 because he wanted to slow down the growth of salary expense in the Department of Human Resources. The Equal Opportunity Division was not singled out. According to the best of Mr. Visconti's knowledge, no one's job in the Department of Human Resources was approved for reclassification in the summer of 2000. Furthermore, no person from the Justice Court or the Coroner's Office was approved either. Mr. Alastuey's decision to refuse all reclassifications applied to everyone in the Department of Human Resources, not just the Plaintiff or the Equal Opportunity Division. (SEE AFFIDAVIT OF VISCONTI, paras. 19-20 AT EXHIBIT 2)

Mr. Visconti testified in his affidavit that the reclassification request was denied in August of 2000 solely because Assistant County Manager Michael Alastuey wanted to slow down the increase in salary expenses in the Department of Human Resources. (SEE AFFIDAVIT OF VISCONTI, para. 21 AT EXHIBIT 2)

Furthermore, the funding source for the Plaintiff's position was switched in late 2001 by Mr. Visconti solely because he wished to accommodate Ms. King's request for Ms. Dudas to be returned to her division and because he wished to keep an employee who was doing EOD work for UMC in the position funded by UMC which was vacated

LAW OFFICES OF  
GARCIA-MENDOZA & ASSOCIATES  
Eva Garcia-Mendoza, Esq.  
Luther M. Snavely, III Esq.  
501 SOUTH SEVENTH STREET  
LAS VEGAS, NEVADA 89101  
(702) 384-8484 FAX (702) 384-0207

LAW OFFICES OF  
GARCIA-MENDOZA & ASSOCIATES  
Eva Garcia-Mendoza, Esq.  
Luther M. Snavely, III Esq.  
501 SOUTH SEVENTH STREET  
LAS VEGAS, NEVADA 89101  
(702) 384-8484 FAX (702) 384-0207

1 by the transfer of Ms. Dudas. (SEE AFFIDAVIT OF VISCONTI, para. 38 AT EXHIBIT  
2 2)

3 Even the Plaintiff, in her deposition, acknowledged the fact that the motive  
4 behind the switch in funding source was an attempt by Mr. Visconti to accommodate  
5 the desire of Barbara King to have Shawna Dudas returned to her.  
6

7 In her deposition, the Plaintiff testified:

8 "Q: So is this whole thing[the switch in funding source] just a convoluted way  
9 to get Shawna[Dudas] back with Barbara King?

10 A: In the end that's what it looked like." (SEE DEPO OF BATES, p. 91 AT  
11 ATTACHED EXHIBIT 1)

12 And:

13 "Q: So this[switch in funding source] was Barbara King's decision to bring  
14 Shawna[Dudas] back to her, correct?

15 A: That's the way I see it, yes, although Raymond[Visconti] says that it was  
16 his decision." (SEE DEPO OF BATES, p. 104 AT ATTACHED EXHIBIT 1)

17 Also:

18 "Q: Do you believe that it was his[Raymond Visconti's]decision to switch your  
19 funding?

20 A: I think that it was partly his decision, him doing a favor for Barbara King  
21 and Don Burnette." (SEE DEPO OF BATES, p. 112 AT ATTACHED EXHIBIT 1)

22 The Court's role is to prevent unlawful hiring practices, not to act as a super  
23 personnel department that second guesses employer's business judgments. **Green v.**  
24 **Maricopa County Community College School District**, 265 F.Supp. 2d 1110, 1128  
25 **(D. Ariz. 2003)**

26 There is nothing in the record to establish that the Defendant's decisions in  
27 regard to the Plaintiff were motivated by a desire to retaliate against her for the  
28 complaints of George Cotton.

1 Accordingly, the Plaintiff's Complaint should be dismissed.

2  
3 **STANDARD OF REVIEW FOR CLAIMS OF DISPARATE TREATMENT**  
4 **RACE DISCRIMINATION**  
5

6 As noted above, the Plaintiff is only claiming Disparate Treatment Racial  
7 Discrimination in regards to her allegation that the funding source for her position was  
8 shifted on account of her race. (SEE DEPO OF BATES, pp. 31-33 AT ATTACHED  
9 EXHIBIT 1)  
10

11 In fact, the Plaintiff did not allege racial discrimination in her initial Charge of  
12 Discrimination filed which she filed with the EEOC on March 30, 2001. Instead, she  
13 seems to have added the racial discrimination charge as a mere afterthought to the  
14 very end of her Amended Charge of Discrimination which she filed with the EEOC on  
15 April 12, 2002. (COMPARE EXHIBITS 4 and 5)  
16

17 Asked to specify the grounds for her charge of racial discrimination, the Plaintiff  
18 testified as follows in her deposition:

19 "Q: What happened between March of 2001 and April 12, 2002 to make you  
20 believe that you were being discriminated against on account of your race?

21 A: Because I was removed from the funding source that I'd previously held  
22 and switched with a white female." (SEE DEPO OF BATES, p. 31 AT ATTACHED  
23 EXHIBIT 1)

24 Under Title VII, an employer may not discriminate against an individual with  
25 respect to her terms, conditions or privileges of employment because of her race. 42

26 U.S.C. §2000e-2(a).  
27  
28

LAW OFFICES OF  
GARCIA-MENDOZA & ASSOCIATES  
Eva Garcia-Mendoza, Esq.  
Luther M. Shavely, III Esq.  
501 SOUTH SEVENTH STREET  
LAS VEGAS, NEVADA 89101  
17021 384-8484 FAX 17021 384-0207



1 The Ninth Circuit has held that the proper legal framework for determining  
 2 whether a Plaintiff claiming disparate treatment racial discrimination should survive  
 3 summary judgment is the burden-shifting scheme set out in **McDonnell Douglas Corp.**  
 4 **v. Green**, 411 U.S. 792, 36 L.Ed. 2d 668, 93 S. Ct. 1817 (1973) See **Aragon v.**  
 5 **Republic Silver State Disposal, Inc.**, 292 F.3d 654, 658 (2002)  
 6

7 Under **McDonnell Douglas**, the Plaintiff must first establish a prima facie case  
 8 of racial discrimination. In particular, she must show that (1) she belongs to a  
 9 protected class, (2) she was qualified for the position, (3) she was subjected to an  
 10 adverse employment action, and (4) similarly situated non-black individuals were  
 11 treated more favorably. **Aragon** at 658.  
 12

13 If the Plaintiff succeeds in establishing a prima facie case, the burden of  
 14 production shifts to the Defendant to articulate a legitimate nondiscriminatory reason  
 15 for taking the adverse employment action against the Plaintiff. **Id.** If the Defendant  
 16 does so, the Plaintiff must demonstrate that the Defendant's articulated reason is a  
 17 pretext for unlawful discrimination by either directly persuading the Court that a  
 18 discriminatory reason more likely motivated the employer or indirectly by showing that  
 19 the employer's explanation is unworthy or credence. **Aragon** at 658-659. However,  
 20 the Plaintiff's evidence must be both specific and substantial to overcome the legitimate  
 21 reasons put forth by the Defendant. **Aragon** at 659. If the Plaintiff demonstrates  
 22 pretext, then the burden-shifting framework disappears and the only remaining issue is  
 23 discrimination vel non. **Id.** While the burden of production may shift, the ultimate burden  
 24 of persuading the trier of fact that the Defendant intentionally discriminated against the  
 25 Plaintiff remains at all times with the Plaintiff. **Id.**  
 26  
 27  
 28

LAW OFFICES OF  
 GARCIA-MENDOZA & ASSOCIATES  
 Eva Garcia-Mendoza, Esq.  
 Luther M. Snavely, III Esq.  
 501 SOUTH SEVENTH STREET  
 LAS VEGAS, NEVADA 89101  
 (702) 394-8484 FAX (702) 384-0207

**THE PLAINTIFF CANNOT ESTABLISH A PRIMA FACIE CASE  
FOR DISPARATE TREATMENT RACIAL DISCRIMINATION**

The Plaintiff cannot establish a prima facie case for disparate treatment racial discrimination because (1) the funding switch was not an adverse employment action and (2) similarly situated non-black individuals were not treated more favorably.

**THE SWITCH IN THE FUNDING SOURCE FOR THE PLAINTIFF'S  
JOB POSITION WAS NOT AN ADVERSE EMPLOYMENT ACTION**

The Defendant has already addressed the issue that merely switching the funding source for the Plaintiff's position from the general fund to the UMC special fund did not constitute an adverse employment action in the context of the Plaintiff's retaliation claim as set forth above.

To summarize, the switch in funding source did not result in the demotion of the Plaintiff nor the addition of duties. She also suffered no loss of salary or benefits as a result of the switch in funding source. She remained a full time employee Clark County employee with all of the rights and privileges of any other Clark County employee as set forth in the Collective Bargaining Agreement and the Merit Personnel System. (SEE AFFIDAVIT OF VISCONTI, para. 36, AT EXHIBIT 2)

Accordingly, as set forth above, the decision by the Defendant to switch the funding of the Plaintiff's position from the general fund to the UMC special fund not an adverse employment decision.

LAW OFFICES OF  
GARCIA-MENDOZA & ASSOCIATES  
Eva Garcia-Mendoza, Esq.  
Luther M. Snavely, III Esq.  
501 SOUTH SEVENTH STREET  
LAS VEGAS, NEVADA 89101  
(702) 384-8484 FAX (702) 384-0207

**THE PLAINTIFF CANNOT SHOW THAT SIMILARLY SITUATED NON-BLACK EMPLOYEES WERE TREATED MORE FAVORABLY THAN HERSELF**

In the context of the switch in funding source, the Plaintiff cannot show that any non-black employees were treated more favorably than herself. The Plaintiff was not passed over for a promotion or a job reclassification. The source of the funding for her job position was simply switched to another fund. She suffered no harm whatsoever. She was not in competition with Ms. Dudas for transfer to the Employee Relations Division so she was not passed over by any non-black employee.

Accordingly, the Plaintiff cannot show that similarly situated non-black employees were treated more favorably than herself in the context of the switch in funding source for her position.

**THE DEFENDANT HAD LEGITIMATE NONDISCRIMINATORY REASONS FOR SWITCHING THE FUNDING SOURCE FOR THE PLAINTIFF'S POSITION**

The Defendant's legitimate nondiscriminatory reasons for switching the funding source for the Plaintiff's position from the general fund to the UMC special fund have already been set forth in the context of the Plaintiff's Retaliation claim.

To summarize, there is no evidence in the record whatsoever to support the Plaintiff's allegation that the switch in funding was racially motivated.

The switch in funding was approved by Raymond Visconti solely because he wished to accommodate Ms. King's request for Ms. Dudas to be returned to her division and because he wished to keep an employee who was doing EOD work for UMC in the position funded by UMC which was vacated by the transfer of Ms. Dudas.

(SEE AFFIDAVIT OF VISCONTI, para. 38 AT EXHIBIT 2)

LAW OFFICES OF  
GARCIA-MENDOZA & ASSOCIATES  
Eva Garcia-Mendoza, Esq.  
Luther M. Snavely, III Esq.  
501 SOUTH SEVENTH STREET  
LAS VEGAS, NEVADA 89101  
(702) 384-8184 FAX (702) 384-0707

1 Mr. Visconti would have approved the funding switch in the very same manner if  
 2 Ms. Dudas had happened to be African-American and the Plaintiff happened to be  
 3 Caucasian . (SEE AFFIDAVIT OF VISCONTI, para. 39 AT EXHIBIT 2)

4 Accordingly, the Plaintiff's Complaint should be dismissed and Summary  
 5 Judgment should be entered in favor of the Defendant.  
 6

7  
 8 **THE LETTER OF DETERMINATION ISSUED BY THE EEOC**  
 9 **HAS LITTLE PROBATIVE VALUE AND DOES NOT**  
 10 **CREATE AN ISSUE OF MATERIAL FACT**

11 In his Complaint(#1), the Plaintiff refers to a "Determination Letter" issued by  
 12 the EEOC pertaining to this case.

13 However, a review of the EEOC Determination letter reveals that it is entirely  
 14 conclusory. (SEE EXHIBIT 6)

15 In Coleman v. Quaker Oats Co., 232 F.3d 1271, 1283-1284 (9<sup>th</sup> Cir. 2000), the  
 16 Ninth Circuit Court of Appeals held that a conclusory EEOC Determination Letter has  
 17 very little probative value and does not create a genuine issue of fact for purposes of  
 18 avoiding summary judgment. In Coleman, the Court examined an EEOC  
 19 Determination Letter which simply stated, " The Commission's investigation finds  
 20 reasonable cause to believe that [Quaker] has violated the[ADEA]. The Commission  
 21 further finds that employers over the age of 40, as a class, were laid off in violation of  
 22 [ADEA]" Id.

23 In holding that the conclusory Letter of Determination would not prevent the  
 24 entry of summary judgment, the Court noted that it was impossible from the Letter of  
 25 Determination to know which facts the EEOC considered and how it analyzed them.  
 26  
 27  
 28

LAW OFFICES OF  
 GARCIA-MENDOZA & ASSOCIATES  
 Eva Garcia-Mendoza, Esq.  
 Luther M. Shavely, III Esq.  
 501 SOUTH SEVENTH STREET  
 LAS VEGAS, NEVADA 89101  
 (702) 384-8484 FAX (702) 384-0207

1 Id. The Court stated that in previous cases it had upheld summary judgment in cases  
 2 in which the EEOC itself had brought suit. Id. The court went on to reason that if the  
 3 EEOC's suing was insufficient to create a genuine issue of material fact, then, a priori,  
 4 a conclusory EEOC reasonable cause letter does not create an issue of material fact.

5  
 6 Id.

7 Very recently, the Ninth Circuit reaffirmed the holding in Coleman and  
 8 specifically held that an EEOC reasonable cause determination does not create a  
 9 genuine issue of material fact as to a discrimination claim under Title VII of the Civil  
 10 Rights Act of 1964, 42 U.S.C. §§2000e et. seq. Mondero v. Salt River Project, 400  
 11 F.3d 1207, 1214-1215 (9<sup>th</sup> Cir. 2005) See also Curtis v. First Watch of Ariz., Inc.,  
 12 2006 U.S. Dist. LEXIS 11823 (D. Ariz. 2006).

13  
 14 Here, as in Coleman, Montero and Curtis, the Letter of Determination attached  
 15 to the Plaintiff's Complaint is completely conclusory. There is no way to know which  
 16 facts, if any, the EEOC considered and how the agency conducted its analysis.

17 Accordingly, the Court should simply disregard the EEOC's Letter of  
 18 Determination attached to the Plaintiff's Complaint.  
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LAW OFFICES OF  
 GARCIA-MENDOZA & ASSOCIATES  
 Eva Garcia-Mendoza, Esq.  
 Luther M. Snavely, III Esq.  
 501 SOUTH SEVENTH STREET  
 LAS VEGAS, NEVADA 89101  
 (702) 394-9484 FAX (702) 394-0707

**CONCLUSION**

For the reasons set forth above, the Defendant respectfully requests that the Court enter Summary Judgment in its favor and dismiss the Plaintiff's Complaint in its entirety.

DATED this 18<sup>th</sup> day of April, 2006.

BY: Luther M. Snavely

LUTHER SNAVELY, ESQ.  
NEVADA BAR NO. 5507  
EVA GARCIA-MENDOZA, ESQ.  
NEVADA BAR NO. 1779  
GARCIA-MENDOZA & SNAVELY  
501 SOUTH SEVENTH STREET  
LAS VEGAS, NEVADA 89101  
(702) 384-8484  
ATTORNEYS FOR DEFENDANT

**CERTIFICATE OF ELECTRONIC FILING AND SERVICE**

I hereby certify that I am an employee of the law firm of GARCIA-MENDOZA & SNAVELY and that on this 18<sup>th</sup> day of April, 2006, I electronically filed the foregoing MOTION FOR SUMMARY JUDGMENT and that such motion was electronically served upon the following at his last known address by the U.S. District Court of Nevada's electronic filing system:

Richard Segerbloom, Esq.  
[www.rsegerbloom@lvcm.com](mailto:www.rsegerbloom@lvcm.com)

Luther M. Snavely

An Employee of Garcia-Mendoza & Snavely, Chtd.

LAW OFFICES OF  
GARCIA-MENDOZA & ASSOCIATES  
Eva Garcia-Mendoza, Esq.  
Luther M. Snavely, III Esq.  
501 SOUTH SEVENTH STREET  
LAS VEGAS, NEVADA 89101  
(702) 384-8484 FAX (702) 384-0707